



January 9, 2002

Ms. Angela K. Washington
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, Texas 75202-3793

OR2002-0164

Dear Ms. Washington:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157116.

The City of Rowlett (the "city") received a request for information about a particular incident and a related internal affairs investigation. You have submitted for our review as Exhibit B a copy of incident report number 01024653 (the "incident report") and as Exhibit C the internal affairs documents. You claim that this submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You first claim that both the incident report and the internal affairs documents are excepted from public disclosure under section 552.108(a)(2). Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You represent, and the documents reflect, that the criminal charges arising from the events described in the incident report have been dismissed. Therefore, we agree that section 552.108(a)(2) is applicable to Exhibit B.

However, section 552.108 is inapplicable to basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Company. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. --Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, with the exception of the basic front page offense and

arrest information, you may withhold Exhibit B from disclosure based on section 552.108(a)(2).

You state that the internal affairs investigation has concluded in a result other than a conviction or deferred or adjudication; thus, it is also excepted under section 552.108(a)(2). It appears, however, that this investigation concerns an administrative matter that only indirectly relates to law enforcement or prosecution. In fact, the submitted documents reflect that the officer being investigated was given an administrative warning that statements obtained from him could not be used in any criminal proceeding. *See Garrity v. New Jersey*, 385 U.S. 493 (1967).¹ Where there is evidence that no criminal investigation or prosecution resulted from the investigation into an officer's misconduct, section 552.108 is inapplicable. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that does not result in a criminal investigation or prosecution); Open Records Decision No. 350 at 3-4 (1982). You further assert that section 552.108 is applicable because the internal affairs investigation stems from a criminal investigation. Although we are cognizant of the fact that the internal investigation is based on an underlying criminal investigation, it nevertheless remains true that the focus of the internal affairs investigation is on the propriety of the officer's conduct, not the underlying criminal investigation. *See Morales*, 840 S.W.2d 519; ORD 350 at 3-4. Consequently, we conclude that the city may not withhold the internal affairs documents in Exhibit C under section 552.108.

You next claim that some of the submitted information is excepted from public disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy;

¹The United States Supreme Court said in *Garrity* that "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office." 385 U.S. at 500.

the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under constitutional or common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked the information in Exhibit C that must be withheld under section 552.101 in conjunction with common-law or constitutional privacy.

We note that Exhibit C contains additional information that might otherwise be protected under section 552.101 in conjunction with common-law or constitutional privacy. However, this information would only be excepted from disclosure to protect the requestor's privacy interests, and section 552.023(a) of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. *See* Open Records Decision No. 481 (1987) (determining that common law privacy does not provide basis for withholding information from its subject). Because the requestor has a special right of access to the information, it may not be withheld under section 552.101.²

Section 552.101 also encompasses information protected by other statutes. Section 773.091 of the Health & Safety Code provides:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

This confidentiality "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services." *Id.* § 773.091(g). In this case, Exhibit C contains EMS records, and it does not appear that any of the exceptions to confidentiality set forth in section 773.092 of the Health and Safety Code apply. Accordingly, the city must withhold the submitted EMS records we have marked under section 552.101 of the Government Code, except for information required to be released under section 773.091(g).

²We emphasize, however, that if the city receives another request for information that relates to the requestor, and the person that requests the information does not have a special right of access to it under section 552.023 of the Government Code, the city should resubmit the information to this office and request another ruling.

You also claim that portions of Exhibit C are excepted from disclosure under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In the instant matter, you claim that there is no legitimate public interest in the information you have marked under section 552.102. However, Exhibit C is an internal affairs investigation of a police officer, and this office has stated in numerous formal decisions that there is a legitimate public interest in how a public employee conducts himself while on-duty and how he performs his job functions. See Open Records Decision Nos. 484 (1987) (public's interest in knowing how police departments resolve complaints against police officers ordinarily outweighs officers' privacy interest), 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 329 (1982) (reasons for an employee's resignation are not ordinarily excepted by constitutional or common-law privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). We therefore conclude that none of the submitted information may be withheld under section 552.102.³

In sum, the city may withhold Exhibit B under section 552.108, with the exception of basic information that must be released. Exhibit C, on the other hand, may not be withheld under section 552.108, nor may any of the information in Exhibit C be withheld under section 552.102. We have, however, marked information in Exhibit C that must be withheld under section 552.101 in conjunction with common-law or constitutional privacy and in conjunction with section 773.091. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

³Because we are able to resolve this matter under the above-referenced provisions, we need not address your arguments under section 552.117.

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

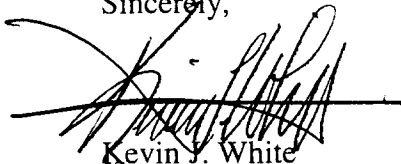
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. White", is written over a horizontal line.

Kevin J. White
Assistant Attorney General
Open Records Division

KJW/seg

Ref: ID# 157116

Enc. Submitted documents

c: Mr. Ray Williams
2301 Shady Oaks Lane
Rowlett, Texas 75088
(w/o enclosures)